FILED
FEB 24 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-304

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTOR PROTECTIVE LEAGUE, an incorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Petitioners,

—v.—

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE INC., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the New York Stock Exchange and American Stock Exchange,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1974
CERTIORARI GRANTED NOVEMBER 18, 1974

ERRATA SHEET

Substantive Errors

Exhibit 7 (A-253) – Is duplicated following Exhibit 8 (A-280)

A-294–A-298 – Charts should be part of Exhibit 12 not Exhibit 13

Typographical Errors

Page No.	*Mistake*	*Correction*
1	Fenn	Fenner
	motio	motion
	Merrill,	Merrill (no comma)
A-88	overflor	overflow
A-216	defendnat	defendant
A-299	Manuel E. Cohen	Manuel F. Cohen

TABLE OF CONTENTS

	PAGES		
	Start	No. of Pages	End
MATERIAL OMITTED FROM APPENDIX			
Remainder of Opinion of the United States Court of Appeals for the Second Circuit	SA-452	[1]	SA-452
Opinion of the United States District Court for the Southern District of New York	SA-453	[13]	SA-465
One of the Charts included with Exhibit 13: Commission as a percent of value for various priced stocks at selected order sizes under present and proposed commission rates	SA-466	[1]	SA-446
Missing part of Exhibit 14	SA-467	[2]	SA-468
Additional Material to be added to chart which forms a part of Exhibit 17 appearing at p. A-324	SA-469	[1]	SA-469
Additional material to be added to chart which forms a part of Exhibit 17 appearing at p. A-316	SA-470	[1]	SA-470

Supplemental Index to Appendix

	Start	No. of Pages	End
Docket Entries	A-1	[5]	A-5
Complaint	A-8	[9]	A-16
Answer of Defendant New York Stock Exchange and Bach & Co., Inc.	A-17	[6]	A-22
Answer of Defendant American Stock Exchange, Inc.	A-29	[6]	A-34
Defendants' Motion for Summary Judgment	A-35	[2]	A-36

	Start	No. of Pages	End
Defendants' Rule 9(g) Statement in Support of Motion for Summary Judgment	A-37	[5]	A-41
Affidavit of H. Vernon Lee in Support of Defendants' Motion for Summary Judgment and Exhibits Annexed	A-42	[11]	A-52
Exhibit A – Article VI of American Stock Exchange Constitution	A-53	[20]	A-72
Exhibit B – Section 6 of American Stock Exchange Office Rules	A-73	[12]	A-84
Exhibit C – American Stock Exchange Subcommittee on Commission Structure Memorandum	A-85	[11]	A-95
Exhibit D – Letter from Ralph S. Saul to Manuel F. Cohen	A-96	[2]	A-97
Exhibit E – Letter from Manuel Cohen to Ralph S. Saul 5/28/68	A-98	[1]	A-98
Letter from Manuel F. Cohen to Robert Haack	A-99	[3]	A-101
Exhibit F – Letter from Ralph S. Saul to Manuel Cohen 6/26/68	A-102	[2]	A-103
Exhibit G – American Stock Exchange Subcommittee on Commission Structure Memorandum 9/20/68	A-104	[15]	A-118

	Start	No. of Pages	End
Exhibit H – Letter from Ralph S. Saul to Hamer H. Budge 3/26/70	A-119	[1]	A-119
Letter from Ralph S. Saul to SEC 3/26/70	A-120	[38]	A-157
Exhibit I – Letter from Hamer H. Budge to Robert Haack 4/2/70	A-158	[3]	A-160
Exhibit J – Letter from Ralph S. Saul to Irving Pollack 4/2/70	A-161	[2]	A-162
Exhibit K – Letter from SEC to Ralph Saul 4/10/70	A-163	[2]	A-164
Exhibit L – Letter from Ralph Saul to Irving Pollack 6/29/70	A-165	[2]	A-166
Exhibit M – Letter from James W. Walker to Hamer Budge	A-167	[5]	A-171
Charts re: surcharge on selected member firms	A-172	[4]	A-175
Exhibit N – SEC Release No. 8924	A-176	[1]	A-176
Exhibit O – Letter from American Stock Exchange to Hamer Budge 7/16/70	A-177	[8]	A-184
Exhibit P – Letter to various Exchanges from SEC 3/17/71	A-185	[2]	A-186
Letter from Richard B. Smith to Robert Haack 10/22/70	A-187	[3]	A-189

	Start	No. of Pages	End
SEC Release No. 9079	A-190	[1]	A-190
Letter from Richard B. Smith to Robert Haack 2/10/71	A-191	[2]	A-192
Letter from Robert Haack to Hugh F. Owens 2/3/71	A-192	[4]	A-195
SEC Release No. 9096	A-196	[1]	A-196
Letter from Hugh F. Owens to Robert Haack 3/2/71	A-196	[2]	A-197
SEC Release No. 9103	A-198	[1]	A-198
Letter from Hugh F. Owens to Robert Haack 3/8/71	A-198	[2]	A-199
Letter from Robert Haack to Hugh F. Owens 3/9/71	A-200	[5]	A-204
Letter from Hugh F. Owens to Robert Haack 3/10/71	A-204	[2]	A-205
Exhibit Q – Letter from Ralph Saul to Irving Pollack 3/26/71	A-206	[4]	A-209
Exhibit R – Letter from Robert J. Birnbaum to Irving Pollack 4/28/71	A-210	[1]	A-210
New Rules	A-211	[2]	A-212
Exhibit S – Letter from the Commission to Paul Kolton 3/9/72	A-213	[1]	A-213

	Start	No. of Pages	End
Exhibit T – Letter to Mr. Pollack 3/28/72	A-214	[2]	A-215
Affidavit of Robert M. Bishop in Support of Defendants' Motion for Summary Judgment and Exhibits Annexed	A-216	[13]	A-228
Exhibit 1 – NYSE Constitution; Article XIX; Chapter VII	A-229	[9]	A-237
Exhibit 2 – Letter re: NYSE Registration 9/28/34	A-238	[2]	A-239
Exhibit 3 – SEC Release No. 5678 4/14/58	A-240	[1]	A-240
Exhibit 4 – Letter from SEC to Edward Gray 1/28/59	A-241	[1]	A-243
Draft of SEC Release	A-244	[3]	A-246
Exhibit 5 – SEC Release No. 5889 2/20/59	A-247	[2]	A-248
Exhibit 6 – Letter from SEC to Keith Funston 12/22/65	A-249	[4]	A-253
Exhibit 7 – Letter to Members and Allied Members from NYSE 1/2/68	A-253	[4]	A-256
Exhibit 8 – SEC Release No. 8239 1/26/63	A-257	[23]	A-279
Exhibit 9 – Letter from Manuel F. Cohen to Robert Haack ...	A-284	[2]	A-285

	Start	No. of Pages	End
Exhibit 10 – SEC Release No. 8324 5/28/68	A-286	[2]	A-287
Exhibit 11 – In re: Commission Rate Structure of Registered National Securities Exchanges: Order Directing Public Investigation and Designating Officers to Take Testimony ...	A-288	[3]	A-291
Exhibit 12 – Letter from Irving Pollack to Robert W. Haack 5/29/68	A-291	[2]	A-292
Exhibit 13 – Letter from Irving Pollack to Robert Haack 5/31/68 with charts	A-293	[6]	A-298
Exhibit 14 – Special Membership Bulletin 6/27/68 .	A-306	[4]	A-309
Exhibit 15 – Letter from Robert Haack to Manuel E. Cohen	A-299	[7]	A-305
Exhibit 16 – Letter from Manuel F. Cohen to Robert Haack	A-310	[3]	A-312
Exhibit 17 – The Urgency for an Immediate Commission Increase (Statement by Robert Haack)	A-313	[14]	A-326
Exhibit 18 – Letter to Members and Allied Members from Robert Haack 3/19/70 ..	A-327	[6]	A-332
Exhibit 19 – Letter from Hamer Budge to Robert Haack 4/2/70	A-333	[3]	A-335

	Start	No. of Pages	End
Exhibit 20 – SEC Release No. 8923 7/2/70	A-336	[12]	A-347
Exhibit 21 – SEC Release No. 9007 10/22/70	A-348	[2]	A-349
Exhibit 22 – Letter from Hamer Budge to Robert Haack 10/22/70	A-350	[3]	A-352
Exhibit 23 – Letter from Richard B. Smith to Mr. Robert Haack 2/3/71	A-353	[2]	A-354
Exhibit 24 – SEC Release No. 9105 3/11/71	A-355	[2]	A-356
Letter from Robert W. Haack to Hugh F. Owens 3/9/71	A-357	[5]	A-361
Letter from Hugh F. Owens to Robert W. Haack 3/10/71	A-361	[2]	A-362
Exhibit 25 – Statement of the SEC on the Future Structure of the Securities Markets 2/2/72 .	A-363	[42]	A-404
Exhibit 26 – Letter from SEC to Irving Pollack 3/17/72	A-405	[1]	A-405
Proposed Amendments of Sections (2) and (4) of Article XV	A-406	[3]	A-408
Exhibit 27 – Letter from Robert Haack to William J. Casey 3/23/72	A-409	[2]	A-410
NYSE Release on Board Action on Negotiated Fees 3/16/72.....	A-411	[2]	A-412

	Start	No. of Pages	End
Letter from William J. Casey to Robert Haack 3/9/74	A-413	[2]	A-414
Affirmation of I. Walton Bader in Opposition to Defendants' Motion to Dismiss or for Summary Judgment	A-415	[4]	A-418
Affidavit of Richard A. Gordon in Opposition to Defendants' Motion for Summary Judgment	A-419	[9]	A-427
Letter of Plaintiffs' Attorney to Hon. Morris E. Lasker 4/27/73	A-428	[2]	A-429
Wall Street Journal Article 4/27/73	A-430	[4]	A-433
Notice of Appeal U.S.D.N.Y. 12/6/73	A-434	[2]	A-435
Opinion of U.S. Court of Appeals for the Second Circuit [Kaufman opinion].....	A-436	[16]	A-451

REMAINDER OF OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ministrative Procedure Act, 5 U.S.C. §§702, 704 (1970), *see* Independent Broker-Dealers' Trade Association v. SEC, 442 F.2d 132 (D.C.Cir.), cert. denied, 304 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 57 (1970), and, in the case of Commission orders, under the provisions of the 1934 Act, 15 U.S.C. §78y (1970). On such review, a court is competent to consider, in accordance with standards appropriate for review of agency action, *see* Administrative Procedure Act §10(e), 5 U.S.C. §706 (1970), the weight given by the Commission to competitive factors in achieving the goals of the 1934 Act.

For the reasons stated, we affirm the district court's grant of summary judgment and dismissal of Gordon's claim.

Affirmed.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Richard A. GORDON, Individually and as President of Independent Investors Protective League, an unincorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced, Plaintiff,

v.

NEW YORK STOCK EXCHANGE, INC., et al., Defendants.

No. 71 Civ. 1496.

United States District Court, S.D. New York.

Dec. 3, 1973.

Proceedings on motion for summary judgment in antitrust action brought against stock exchanges and individual members. The District Court, Lasker, J., held that party who had not sought membership in stock exchange could not bring action based on claim members were arbitrarily limited, that stock trade executions were not "commodities" within Robinson-Patman Act, and that commission rate structure of exchanges was within congressional policy of exchange self-regulation.

Motion granted.

1. Monopolies 28(1.6)

Person who had never applied for membership in stock exchanges could not be heard to complain that memberships were arbitrarily limited. Clayton Act, §4, 15 U.S.C.A. §15.

2. Monopolies 12(18)

In view of language of Securities Exchange Act of 1934 to effect that nonmembers' access to exchange facilities is limited, party could not base action against stock exchanges on claim that they denied use of their facilities to nonmembers unless nonmembers paid same rate of commission charged general public. Clayton Act, §4, 15 U.S.C.A. §15; Securities Exchange Act of 1934, §3(a)(3), 15 U.S.C.A. §78c(a)(3).

3. Trade Regulation 911

Stock trade executions are not "commodities" within meaning of Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. §13(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Monopolies 12(18)

Federal court lacked jurisdiction to entertain antitrust attack on commission rate structure of stock exchanges, since fixing of commission falls squarely within congressional policy of exchange self-regulation. Clayton Act, §4, 15 U.S.C.A. §15; Securities Exchange Act of 1934, §19(b), 15 U.S.C.A. §78s(b).

Bader & Bader, New York City, for plaintiff.

Milbank, Tweed, Hadley & McCloy, New York City, for defendants New York Stock Exchange, Inc. and Bache & Co., Inc.

Lord, Day & Lord, New York City, for defendant American Stock Exchange, Inc.

Brown, Wood, Fuller, Caldwell & Ivey, New York City, for defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.

MEMORANDUM

LASKER, District Judge.

In this action, brought by Richard A. Gordon, individually and as President of Independent Investors Protective League, against the New York Stock Exchange, the American Stock Exchange ("the Exchanges") and their member firms, plaintiff alleges several violations of the Robinson-Patman Act and the Sherman Act, to the detriment of "small investors" (those ineligible for either "volume discounts" on trades of over 1,000 shares, or negotiated rates on trades above the $500,000 [now $300,000] "break-point").

Specifically, plaintiff attacks the Exchanges' practices of making their facilities available only to members and of limiting the number of memberships; he also alleges that members have conspired with the Exchanges to fix rates for small investors at an unreasonably high level in view of the actual cost of executing a trade; that negotiated rates and volume discounts are set at unreasonably low levels in view of the actual costs of execution; and that this scheme unlawfully discriminates against small investors. In short, plaintiff makes a number of related claims, the essence of which is a broadside attack on the present commission structure of the Exchanges.

Defendants have moved for an order dismissing the action and granting summary judgment on the grounds that the practices complained of are within the exclusive jurisdiction of the Securities and Exchange Commission, that the SEC, acting pursuant to §19(b) of the Exchange Act of 1934, 15 U.S.C. §78s(b), has been actively regulating these practices, and that, consequently, the practices are exempt from the provisions of the antitrust law so that the court is without subject matter jurisdiction.

I.

We deal first with plaintiff's related claims regarding the Exchanges' practices of limiting the number of memberships, and denying the use of their facilities to non-members unless they pay the same rate of commission charged the general public (Complaint, Paragraph 17).

[1] As to the first claim, plaintiff lacks standing to sue since he has not met the threshold requirement of §4 of the Clayton Act: "Any person who shall be injured in his business or property by reason of any thing forbidden in the antitrust laws may sue therefor . . ." (15 U.S.C. §15). Since it is undisputed that plaintiff has never made application for membership in either defendant Exchange, he cannot be heard to complain that memberships are arbitrarily limited. See Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971); Data Digests, Inc. v. Standard & Poor's Corporation, 43 F.R.D. 386, 387-388 (S.D.N.Y. 1967).

[2] Plaintiff's second claim must also fail in view of the clear language of the Exchange Act of 1934 to the effect that non-members' access to Exchange facilities is limited. Section 3(a)(3) states:

> "The term 'member' when used with respect to an exchange means any person who is permitted either to effect transactions on the exchange without the services of another person acting as broker, or to *make us of the facilities of an exchange for transactions thereon without payment of a fee or with the payment of a commission or fee which is less than that charged the general public,* and includes any firm transacting a business as broker or dealer of which a member is a partner, and any partner of any such firm." (emphasis added)

The fact that the limited membership characteristic of the Exchanges inheres in their very nature has been recognized by the Supreme Court, Silver v. New York Stock Exchange, 373 U.S. 341, 350-351, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) and this Circuit, Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 346 F.Supp. 217, 228 (S.D.N.Y. 1972), aff'd per curiam, 466 F.2d 743 (2d Cir. 1972) CCH Sec. L. Rep. ¶93,607.

II.

[3] Plaintiff's claims of price discrimination predicated upon the Robinson-Patman Act, 15 U.S.C. §13(a), are without merit. The Act requires that the alleged price discrimination be in connection with "commodities of like grade and quality". The authorities are clear that services and intangibles (such as stock trade executions) are not "commodities" within the meaning of the Act. Columbia Broadcasting System v. Amana Refrigeration, 295 F.2d 375 (7th Cir. 1961); Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969), and cases cited therein.

III.

Plaintiff's remaining claims relating to the commission rate structure of the Exchanges pose the question whether the Exchanges, subject to SEC supervision, can fix commission rates without incurring Sherman Act liability. It is, of course, conceded by defendants that any such immunity must be provided, if at all, by the Securities & Exchange Act of 1934.

The question of the extent to which the 1934 Act exempts the Exchanges from the anti-trust laws has not been considered in this Circuit since Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). That case involved a non-member broker who had

secured private wire connections with certain New York Stock Exchange firms. The Exchange had approved Silver's connections on a temporary basis, but subsequently ordered them disconnected without notice or hearing. After observing that the Exchange's actions absent justification from the Exchange Act, would have constituted a *per se* violation of the Sherman Act, the *Silver* court sought to reconcile the "antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anti-competitive effects in general and in specific applications." (*Silver*, 373 U.S. at 349, 83 S.Ct. at 1252.)

Noting that the Exchange Act does not give the commission jurisdiction to review *particular instances of enforcement* of Exchange rules, the Court stated that consequently the question of antitrust exemption did "not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power," and that court review of the circumstances there presented "is therefore not at all incompatible with the fulfillment of the aims of the [Act]". (*Silver* at 359, 83 S.Ct. at 1258.) The court concluded that the severance of the private wires occurred under "totally unjustifiable circumstances" (*Silver* at 361, 83 S.Ct. 1246) and that no policy of the Exchange Act was served by denial of notice and opportunity for hearing.

In so holding, however, *Silver* did not specify the circumstances in which a federal district court must decline jurisdiction to avoid a possible conflict with the commission, and specifically reserved decision on the possible anti-trust immunity of exchanges where "review of exchange self-regulation [is] provided through a vehicle other than the antitrust laws. . . ." (p. 360, 83 S.Ct. p. 1258).

[4] We hold that this court lacks jurisdiction to entertain an anti-trust attack on the commission structure of the

Exchanges, since the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act. Since the Act expressly directs the SEC to supervise the "fixing of reasonable rates of commission" (§19(b)(9)), we believe this is the "different case," on which *Silver* reserved decision, where review of exchange self-regulation is available "through a vehicle other than the antitrust laws" (*Silver*, p. 360, 83 S.Ct. p. 1258).

In so holding, we are in disagreement with the Seventh Circuit. See Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 532 (1971), a decision to which we return later on.

We believe that while *Silver* quite properly punctured the umbrella of anti-trust immunity claimed by the Exchange, it did not intend Congress' unique self-regulatory scheme to be totally dampened by the continuous interference of an anti-trust court. We read *Silver* as holding that certain limited areas of Exchange regulation—such as potentially anti-competitive and arbitrary conduct directed at non-members—are properly interfered with by a reviewing court since the Act purports to regulate only the conduct of registered exchanges (and their members) with regard to the public, rather than the entire securities business. But *Silver* also contemplates a certain zone of anti-trust immunity in the regulatory process where there is little threat of such arbitrary and discriminatory activity.

Without venturing to describe the full contours of this immunity, we believe that the Exchange Act, as constructed by *Silver*, left the power to fix commission rates within the exclusive jurisdiction of the Exchange, subject to commission supervision.

This construction finds ample support in the language of *Silver*. The court describes the Exchanges as "by their nature bodies with a limited number of members" (373

U.S. p. 350, 83 S.Ct. p. 1253) with a "federally mandated duty of self-policing" (p. 352, 83 S.Ct. p. 1254).

> "The pattern of governmental entry . . . was by no means one of total displacement of the exchanges' traditional process of self-regulation . . . Thus the Senate Committee Report stressed that the 'initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S.Rep. No. 792 [73d Cong., 2d Session (1934)] at 13.

The court continues (at 360-361, 83 S. Ct. at 1258-1259) that:

> "The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court. . . . But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act."

The clear import of this language is that the Exchange Act sanctions certain "anti-competitive" features of the Exchanges so long as they further the policy of self-regulation and are subject to Commission supervision,

guided by the "rule of reason". Indeed, we note that *Silver* sets out at some length (pp. 354-356, 83 S.Ct. 1246, n. 9) the welter of Exchange rules restricting members' relations with non-members, which were there in issue.

In holding that the *manner of enforcing* these rules was illegal, *Silver* never intimates that the rules themselves are subject to anti-trust attack, and indeed recognizes the necessity for them (pp. 354-356, 83 S.Ct. 1246).

The facial language of the Exchange Act gives the Exchange and the Commission the power to "fix" commission rates. Section 6(d) of the Act requires that registered exchange adopt rules "just and adequate to insure fair dealing and to protect investors;" that is, §6(d) mandates self-regulation. As *Silver* observes "[t]he general dimensions of the duty of self-regulation are suggested by §19(b) of the Act, 15 U.S.C. §78s(b), which gives the Commission power to order changes in exchange rules respecting a number of subjects . . ." (pp. 352, 1254). §19(b) recites:

> "Sec. 19. * * * The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as * * * (9) *the fixing of reasonable rates of commission, interest, listing, and other charges;* (10) *minimum units of trading . . .*; * * * and (13) similar matters." (emphasis added)

We recognize that the legislative history of the 1934 Act is, perhaps typically, ambiguous as to Congress' intent regarding the Exchanges' long-standing practice of fixing commission rates. As Professor Baxter of Stanford Law School has noted:

> "[t]he attention of Congress in 1934 was focused on problems of dishonesty, manipulation, and solvency, and . . . no coherent congressional purpose was articulated concerning the problems of intra-industry competitive structure." Baxter, New York Stock Exchange Fixed Commission Rates: A Private Cartel Goes Public, 22 Stan.L.Rev. 675, 685 (1970).

However, Congress clearly was aware of the Exchanges' rate-fixing practices, since both House and Senate debates on the Act specifically refer to the fixing of commissions. See, e.g., 78 Cong. Rec. 8087, 8092, 8490, 8493-94 (1934).[1]

Nevertheless, however unclear the Congressional debate in 1934 may be as to the permissibility of fixing commissions, we believe the history of Exchange rate-regulation since the passage of the Act is entitled to substantial weight. As to the proper construction of the Act, we cannot overlook the fact that Exchange regulation of fixed commissions has existed virtually unchallenged for nearly 40 years since the passage of the Act.

In the case most in point, Kaplan v. Lehman Brothers, 250 F.Supp. 562 (N.D.Ill.1966), aff'd 371 F.2d 409 (7th Cir. 1967), shareholders of five mutual funds brought a treble damage action against the New York Stock Exchange and several stock brokerage firms claiming that the

1. In Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133 (E.D.Wis. 1973), the post-trial brief of the United States, as intervenor, arguing the *illegality* of fixed commission, and the anti-rebate rule concedes that it cannot be said that Congress intended to outlaw fixed minimum commissions in passing the 1934 Act. (Post-trial brief at pp. 8-9).

fixing of minimum commissions was a *per se* violation of the Sherman Act. The Court of Appeals affirmed an award of summary judgment for the defendants since, as the trial court noted, plaintiff's *per se* allegation was defective in light of the weighing process required under *Silver*. Though *Kaplan* is distinguishable on its facts, the court there recognized the possibility of a conflict of jurisdiction with the Commission. Its comments are applicable here since the gist of the complaint in both cases is that plaintiff paid higher rates than would have obtained in the absence of Exchange rate-fixing.

"The plaintiffs have complained of the rates because they are fixed. If they had complained instead that the rates were too high, they would find no support in the antitrust laws. The remedy for a level of rates which is unreasonably high rests with the SEC. Ratemaking is a matter for which the courts are ill-equipped and accordingly a matter traditionally committed to an administrative agency. [citation omitted]. The SEC since its establishment has exercised this power of review over Exchange rates of commission, and it has inaugurated a regular system of reporting from Exchange members to furnish the necessary information.

> . . . To leave the determination of reasonableness to the prospective decisions of the agency which is especially qualified and responsible for the general supervision of the industry will assure the intention of Congress as well as the interests of the public." (250 F.Supp. at 566).

We note that, beginning with the 1963 Special Study of The Securities Markets, the SEC and the Exchanges have undertaken intensive examination of Exchange commission structures and related matters. In 1968, the SEC initiated public hearings on the commission rate structure.

Certain rate adjustments, such as the volume discount, and the interim charge, and experiments with negotiated

commissions have resulted from these activities. Most significant, the SEC recently announced, in its Release 10383 (September 11, 1973), its intention to terminate the Exchange practice of fixing minimum commissions on all securities transactions after April 30, 1975, unless the Exchange in the meantime alters its rules to the same effect. It is fair to infer that the SEC is continuing to exercise its jurisdiction actively over rate-setting, pursuant to §19(b)(9) of the Act.

Moreover, recent developments in Congress regarding the commission structure support the holding here. The Senate recently rejected amendments to the 1934 Act which would have mandated the elimination of fixed commissions within two years. See 119 Cong. Record, S11385-6, June 18, 1973. It is reasonable to infer from the proposal of these amendments that Congress did not believe fixed commissions were already illegal under the anti-trust laws, and, of course, the rejection of the amendments suggests that Congress does not now regard fixed rates as offensive to the Exchange Act or the anti-trust laws.

Finally, we come to the recent decision in Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), cert. denied, 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 532 (1971).

In *Thill*, a non-member broker-dealer attacked the anti-rebate rule of the New York Stock Exchange as violative of the Sherman Act. The Seventh Circuit reversed the grant of summary judgment in favor of the New York Stock Exchange predicated on a claim of immunity, and remanded the case to the trial court for further evidence on the effects of the anti-competitive acts complained of, the extent to which the rule was subject to actual review by the SEC, and the extent to which the anti-rebate rule was "necessary to make the Securities Exchange Act work." (*Thill*, 433 F.2d at 270).

We believe that *Thill* is distinguishable from our case. First, the Act contains no specific directive to the SEC to

supervise member-non-member relations; second, there was before the court no record of active SEC supervision in the area; third, the court thought the power to refuse to share commissions with non-members was a "weapon 'that can be used to injure a particular competitor' " (p. 270) and the plaintiff had alleged that the anti-rebate rule had in fact been unevenly applied.

Indeed, in distinguishing *Kaplan, supra*—another Seventh Circuit case—the *Thill* court placed considerable weight on the distinction it perceived between the non-discriminatory application of fixed commission rates (at issue in *Kaplan*) uniformly charged to the *public*, and the application of rules governing rebates with non-member broker-dealers (433 F.2d p. 270).

We must add, if it is not already clear, that if *Thill* is to be read as holding that an anti-trust court has concurrent jurisdiction with the SEC over *all* potentially anti-competitive practices and rules, we disagree.

For the foregoing reasons, defendants' motion for summary judgment is granted.

In view of our decision here, we do not consider plaintiff's motion for a class action determination.

It is so ordered.

ONE OF THE CHARTS INCLUDED WITH EXHIBIT 13: COMMISSION AS A PERCENT OF VALUE FOR VARIOUS PRICED STOCKS AT SELECTED ORDER SIZES UNDER PRESENT AND PROPOSED COMMISSION RATES

COMMISSION AS A PERCENT OF VALUE FOR VARIOUS PRICED STOCKS AT SELECTED ORDER SIZES UNDER PRESENT AND PROPOSED COMMISSION RATES

Trade Size	Commission As Percent of Value Under Present Commission Rates					Commission As Percent Of Value Under Proposed Commission Rates				
Shares	Price Per Share					Price Per Share				
100-400	1.70	1.35	1.13	0.75	0.49	1.60	1.30	1.10	0.80	0.68
Value										
$ 30,000	1.70	1.35	1.13	0.75	0.49	0.93	0.82	0.78	0.75	0.88
60,000	1.70	1.35	1.13	0.75	0.49	0.73	0.73	0.69	0.64	0.63
120,000	1.70	1.35	1.13	0.75	0.49	0.72	0.68	0.62	0.59	0.57
360,000	1.70	1.35	1.13	0.75	0.49	0.705	0.65	0.58	0.55	0.54
720,000	1.70	1.35	1.13	0.75	0.49	0.70	0.64	0.575	0.54	0.53
2,160,000	1.70	1.35	1.13	0.75	0.49	0.70	0.635	0.57	0.54	0.52
10,800,000	1.70	1.35	1.13	0.75	0.49	0.70	0.63	0.57	0.53	0.52

MISSING PART OF EXHIBIT 14

(3) *The Exchange considers that continuation of customer-directed give-ups weakens the economic basis of the minimum commission structure itself. Therefore, the Board has voted in favor of their step-by-step prohibition.* For obvious reasons, customer-directed give-ups cannot be effectively abolished by the unilateral action of one national securities exchange. To be effective, the action must apply uniformly to all markets. If not, such give-ups would likely continue on any exchange whose rules permitted them, to the detriment of exchanges where they were not allowed.

At a time when the principle of minimum commissions is being questioned, it may be more difficult to defend the economic basis of the minimum commission law if members are able to give up, or give away, a substantial part of the minimum commission. In any case, a commission schedule that includes a volume discount would reduce the wherewithal for give-ups.

We are asking the SEC to take appropriate action to initiate step-by-step prohibition of all customer-directed give-ups. Step-by-step implementation, over a period of at least one year, would give firms an opportunity to adjust to the economic impact of such a change. We would, of course, expect continuation of bona fide agency-principal relationships between members for such services as clearing, floor brokerage and introducing of accounts on a disclosed basis.

The Costs and Revenues Committee is still continuing its work with respect to such matters as intra-industry rates and policy regarding institutional membership, and expects to report on these subjects at a later date.

If approved by vote of the membership, the new commission schedule and related amendments and rules would be the first revision of New York Stock Exchange rates in nine years.

Basic shifts are taking place in the nature of the securities business. It is imperative that our commission structure be responsive to the facts of life in today's marketplace.

In the letter of January 2 to the membership, it was noted that a major factor in the Board's endorsement of important structural changes at that time was that a network of practices in the industry are eroding the present minimum commission structure.

An intricate maze of give-ups, give-aways, reciprocal practices, manufactured participations in trades, transported trades moved from one exchange to another, and the like, have resulted in considerable leakage of the commission dollar.

Regulatory developments since January have underscored the need for taking action along the lines then recommended.

Shortly after we presented our January proposal, the SEC advanced an incompatible suggestion, its proposed Rule 10(b)-10, requiring that any give-up directed by an investment company must, in effect, be rebated to the institution. In a comment on that proposal, the Department of Justice questioned the necessity for and propriety of any minimum commissions. Then the SEC in advancting its proposed "interim" commission proposal in May, and requesting that the NYSE place it in effect by September 15, 1968, offered as an alternative, the abolition of minimum commissions on all orders above $50,000. The SEC's "interim" proposal quite apart from its serious effect on member firm revenues, would present severe operational problems.

ADDITIONAL MATERIAL TO BE ADDED TO CHART WHICH FORMS A PART OF EXHIBIT 17 APPEARING AT P. A-324

NYSE business), average commissions per transaction for all except two came closer to the lower figure than the higher. The average commission was $42.60 and the range was from $37.63 to $50.51.

COMMISSION PER SECURITY AGENCY TRANSACTION 16 LARGE RETAIL FIRMS FIRST HALF 1969

Firm	Average Commission*	Firm	Average Commission*
1	$37.63	9	$42.76
2	38.18	10	43.14
3	38.30	11	43.84
4	39.49	12	45.21
5	40.22	13	45.43
6	40.49	14	45.48
7	40.69	15	49.19
8	41.12	16	50.51

*Mean of averages for the first and second quarters.

Source: Wright Associates, Management Consultants, New York, N.Y.

ADDITIONAL MATERIAL TO BE ADDED TO CHART WHICH FORMS A PART OF EXHIBIT 17 APPEARING AT P. A-316

Among the 156 firms that experienced losses on SCI income in 1969, fully one-quarter had losses equivalent to over 25% of capital and over one-third had losses in the 11% to 25% range.

Among the 228 firms with SCI profits, about one in four had after-tax profits in excess of 15%, while about one in three had after-tax profits of 5% or less.

Taking all 392 firms together, the proportion with after-tax returns in excess of 15% was only one out of six. At the other end of the scale, the proportion of all firms with losses on their capital in excess of 15% was one out of five. One out of ten firms experienced losses of more than 25% on their invested capital. Obviously, such monumental losses cannot be sustained by any industry for very long.

LOSS OR AFTER-TAX RETURN ON CAPITAL FIRST-HALF 1969 AT ANNUAL RATES

Profit or Loss Rate	Number of Firms		Proportion of Total Firms	
(Per cent)			(Per cent)	
Losses				
51% & over	14		4%	
-26—50	25		7	
-16—25	32		8	
-6—15	44		11	
-1—5	41		10	
Total, loss firms		156		40%
Broke even		8		2%
Profits				
1—5	83		21	
6—15	83		21	
16—25	34		8	
26—50	14		4	
51% & over	14	228	4	58%
Total, all firms		392		100%